SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No.

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner

against

SIDNEY BLUMENTHAL & COMPANY, INC.,
Respondent.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The decision below that the District Court's finding of no negligence was a matter of law subject to review is in conflict with decisions of the Circuit Courts of Appeal for the Fifth, Eighth and Ninth Circuits.

In its opinion the Circuit Court of Appeals said:

> "Upon this appeal it [petitioner here] insists that there are no disputed questions of fact, and that, as the decision below was not 'clearly erroneous,' we have nothing to review. That depends upon whether we are to call the proper standard of care a question of fact. In cases tried to a jury it is indeed treated as such, although obviously it is not a question of fact, for it measures the duty and the liability which the law imposes; upon appeal in a cause tried to a judge, we think it should not be so regarded. As we view it, therefore, the cause comes before us as it did before the District Judge; like him, we have only to decide what measure of care the situation imposed" (R. 226).

This was plain error and contrary to considerable authority.

In *Richmond & Danville Railroad Company* v. *Powers*, 149 U. S. 43, this Court said:

> "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fairminded men will honestly draw different conclusions from them" (p. 45).

To the same effect see *Texas & Pacific Ry. Co.* v. *Harvey*, 228 U. S. 319, 324; *McDermott* v. *Severe*, 202 U. S. 600, 604; *Patton* v. *Texas & Pacific Ry. Co.*, 179 U. S. 658, 660; *Edwards* v. *Baltimore & O. R. Co.*, 131 F. (2d) 366, 368, C. C. A. 7.

In *Dooley* v. *Pease*, 180 U. S. 126, this Court said:

> "Where a case is tried by the Court, a jury having been waived, its findings upon questions of fact are conclusive in the Courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. Stanley v. Supervisors, 121 U. S. 547.
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> Errors alleged in the findings of the Court are not subject to revision by the Circuit Court of Appeals, or by this Court, if there was any evidence upon which such findings could be made. Hathaway v. National Bank, 134 U. S. 498; St. Louis v. Retz, 138 U. S. 241; Runkle v. Burnham, 153 U. S. 225" (pp. 131-2).

Rule 52 of the Federal Rules of Civil Procedure explicitly admonishes the Courts that "findings of fact shall not be set aside unless clearly erroneous". This rule is as applicable to the finding of a Court, without a jury, that there was no negligence as it is to any other fact.

In *Borserine* v. *Maryland Casualty Co.*, 112 F. (2d) 409, C. C. A. 8, the Court said:

> "The trial court determined that Christopher & Company was not guilty of any negligence which would relieve the drawee banks of their liability. That finding, unless clearly erroneous, is binding on this Court. Rule 52(a) of the Rules of Civil Procedure, 28 U. S. C. A. following § 723c" (p. 416).

In *United States* v. *DeBack*, 118 F. (2d) 208, C. C. A. 9, the Court, upon appeal after trial without a jury, said:

> "Whether the motion of a train is of such nature as to constitute negligence is a question of fact" (p. 210).

In *Andruss* v. *Nieto*, 112 F. (2d) 250, C. C. A. 9, the Court, on an appeal after a trial without a jury, said:

> "* * * in any event, it was for the District Court to say, from all the evidence, whether defendant was guilty of negligence" (p. 252).

To the same effect see *City of San Diego* v. *Perry*, 124 F. (2d) 629, C. C. A. 9; *Fidelity & Deposit Co.* v. *Aberdeen National Bank & Trust Co.*, 124 F. (2d) 973, C. C. A. 8; *Helvering* v. *Johnson*, 104 F. (2d) 140, C. C. A. 8; *United States* v. *Gamble-Skogmo Inc.*, 91 F. (2d) 372, 374, C. C. A. 8; *United States* v. *Washington Dehydrated Food Co.*, 89 F. (2d) 606, 609, C. C. A. 8; *Stevens* v. *Edwards*, 112 F. (2d) 534, C. C. A. 5.

There is no support in the authorities and there is no support in reason for the decision below that the Circuit Court of Appeals was as free as the trial judge to decide *de novo* the question of negligence. The long established doctrine that the trier of the facts, whether jury or Court, determines as a matter of fact whether negligence exists, should not be upset without reason.

SECOND POINT

The decision below is in conflict with decisions of the Circuit Courts of Appeal for the Third and Fourth Circuits and is also in conflict with prior decisions in the Second Circuit.

The District Court found

> "7. The hurricane was not anticipated by the local office of the United States Weather Bureau. * * *" (R. 216).

This finding was supported by the uncontradicted testimony of the Weather Bureau meteorologist (R. 136-8).

Nevertheless, the Circuit Court of Appeals, entering the fact field *de novo,* found that the connecting carrier "had reason to anticipate what she in fact encountered [the hurricane]" (R. 229).

The basis of the finding of the Circuit Court of Appeals was the noon weather forecast in response to which the Weather Bureau hoisted hurricane flag signals. This forecast indicated that a tropical storm, central about one hundred miles east of the Virginia Capes, was moving rapidly northward attended by shifting gales. The forecast said nothing about the hurricane's striking New York. Indeed, the forecast confined its prophecy concerning winds of gale force to the coast of Maryland, South Delaware and New Jersey (see storm warning messages for September 21, 1938 opposite R. 214).

As the District Court found (Finding 7, R. 216) the hurricane flags were hauled down, and the noon forecast became obsolete at 2:15 p.m. when the local Weather Bureau

received new instructions from Washington. As of 2:15 p.m. the forecast was

> "Change to northwest storm warnings 2:00 p.m., Virginia Capes to Sandy Hook, New Jersey. Tropical storm central 12:00 noon about 75 miles east southeast of Atlantic City moving rapidly north northeastward with no material change in intensity since morning. Storm center will likely pass over Long Island and Connecticut late this afternoon or early tonight attended by shifting gales" (opposite R. 214).

Having held that

> " * * * the carrier is charged with notice of all information, available to those in its employ on shore * * * " (R. 226).

the Circuit Court of Appeals nevertheless charged petitioner's connecting carrier *not* with knowledge of the forecast current when the tug set out, but with an obsolete forecast cancelled as of 2:00 p.m. by the receipt at 2:15 p.m. of the forecast last quoted.

The Circuit Court of Appeals attempted on three grounds to escape the effect of the 2:15 p.m. forecast.

1. The Court found that the 2:15 p.m. message was received too late to stop the tug, reversing the Trial Court on a question of fact. The Trial Court found that at 2:15 p.m. the tug pulled the floats from the bridges but also found that it was not until 2:20 p.m. that the tug had turned the floats around and headed toward Bay Ridge (Finding 4, R. 215-16). The connecting carrier's dispatcher at Greenville testified without contradiction that the tug "backed out at 2:15 and left at 2:20" (R. 110). Since the tug did not depart until five minutes after the 2:15 p.m. forecast had been received, the Circuit Court of Appeals has charged

petitioner's connecting carrier with knowledge of an obsolete forecast, not current at the time of setting out.

2. The Court said of the 2:15 p.m. forecast: "like all such notices it was a forecast, and would tell nothing about the weather during the next thirty minutes, which was all that counted" (R. 229-30). Here again the Court reversed the District Court on a question of fact. The District Court found that the 2:15 p.m. forecast "contained the prophecy that the hurricane would likely pass over Long Island and Connecticut late in the afternoon or early in the evening" (Finding 7, R. 216-17). The forecast itself concludes with these words: "Storm center will likely pass over Long Island and Connecticut late this afternoon or early tonight attended by shifting gales" (opposite R. 214). Patently the forecast did exactly what the Circuit Court of Appeals said it did not do, viz., forecast the weather during the next thirty minutes. Indeed, it forecast that the hurricane would not strike even Long Island until "late" in the afternoon—long after Transfer No. 20 could reasonably be expected to have concluded its fifty to sixty minute run beginning at 2:15 p.m.

3. The Circuit Court of Appeals considered that the fact that the storm center would pass over Long Island was of small consequence because, as it said, as hurricanes come into high latitudes they extend their diameter although with decreasing velocity of wind (R. 230). Without benefit of evidence and in the face of contrary findings by the Trial Court the Circuit Court of Appeals purported to make a *nunc pro tunc* forecast casting aside the contemporary forecast of the United States Weather Bureau and held petitioner because its connecting carrier did not at the time make as successful a guess.

There was nothing in the local apparent conditions of weather to warn tug Transfer No. 20 of the imminence of the hurricane. The District Court found that the weather when the tug set out at 2:15 p.m. was substantially the same as it had been since 7:00 a.m. (Finding 5, R. 216). It is undisputed that Transfer No. 20 had been towing carfloats back and forth over the same route since 7:00 a.m. and had experienced no difficulty (R. 14-17; Finding 5, R. 216).

The Circuit Court of Appeals likewise stressed the falling barometer (R. 228). The connecting carrier had no barometer and did not know of its behavior. However, the Weather Bureau was amply equipped with barometers yet did not anticipate the hurricane in New York and did not expect it to strike Long Island until "late" in the afternoon or early in the evening. Nevertheless, the Circuit Court of Appeals held that it was negligence for the connecting carrier to fail to interpret its non-existent barometer more wisely than the United States Weather Bureau interpreted its many barometers and other instruments.

Conflicting Decisions

The decision of the Circuit Court of Appeals is in substantial conflict with the decisions of the Circuit Courts of Appeal for the Third and Fourth Circuits and it is in such conflict with its own prior decisions that the law in the Second Circuit is wholly unsettled.

In *The E. V. McCaulley*, 90 Fed. 510, C. C. A. 3, tugs set out with a seagoing tow in dubious weather conditions but no storm signals were flying. A storm arose and the tow was lost. The Court held the tugs not negligent, held that the tugs were entitled to rely upon the absence of

storm signals and "that those relying upon them should not be considered negligent or careless" (p. 511).

In *The Fred Smartley, Jr.*, 100 F. (2d) 971, C. C. A. 4, a tug set out with a tow from Baltimore under doubtful weather conditions but in the absence of storm signals at the Weather Bureau the tug was exonerated.

In *Bronx Barge Corporation* v. *Connelly Transp. Corporation*, 35 F. (2d) 294, C. C. A. 4, a tug set out with a tow from Norfolk. Arriving at Morehead City, N. C. storm warnings were up and the tug waited for four days and then proceeded. The following day the tug with her tow arrived at Cape Fear and in doubtful weather conditions proceeded to sea. No storm signals were flying, however, and although the tow was lost in a storm the tug was exonerated.

In *Morris & Cumings Dredging Co.* v. *Moran Towing & Transportation Co.*, 163 Fed. 610, aff'd 177 Fed. 1004, C. C. A. 2, no storm signals were flying when the tug passed Governors Island and although storm signals were hoisted soon thereafter the tug was exonerated.

In *The Argus*, 31 Fed. 481, D. C. Del., the tug passed out from Delaware Capes bound for Norfolk when no storm signals were flying, although the weather was doubtful. A storm arose, however, resulting in damage to the tow. The Court exonerated the tug expressing the sound rule succinctly: "He [tug master] used his best judgment in forecasting the weather, and cannot be held accountable for the want of infallibility" (p. 485).

Respondent may argue that although the hurricane signals were hauled down at 2:15 p.m. signals indicating a northwest storm immediately replaced them. However, storm signals, as distinguished from hurricane signals,

had been flying for many hours prior to the hoisting of the hurricane signals at noon, yet Transfer No. 20 had plied back and forth over the precise route since 7:00 a.m. with tows of exactly the same kind without experiencing any difficulty. It must be remembered, and was perhaps overlooked by the Circuit Court of Appeals, that it was not the northwest winds prophesied at 2:15 p.m. that caused the car containing respondent's merchandise to go overboard. Rather it was a hurricane which, although once predicted, was no longer predicted by the Weather Bureau when the tug set out.

The present and prior decisions of the Circuit Court of Appeals for the Second Circuit are so conflicting that the law on the point is completely unsettled. In the instant case, the Court has held that a tug is negligent for failing to anticipate the arrival of a hurricane, although when it set out, hurricane signals were not flying and the Weather Bureau did not anticipate the hurricane in New York Harbor. In other cases it has exonerated tugs although they set out in the face of Weather Bureau warnings forecasting the arrival of the very storm causing the damage.

In *Bouchard Transp. Co.* v. *Pennsylvania R. Co.*, 6 F. (2d) 362, C. C. A. 2, storm signals were flying but the tug was exonerated. The Court said:

> "The case obviously turns primarily upon the condition of the weather. * * * Before the Mercer left the scow, warnings of a southeasterly storm had been raised upon the [Weather Bureau] building. Nevertheless we agree with the learned District Judge in his conclusion that it was not imprudent to leave the barge in the flotilla at half past 10 on that night. On more than 50 days of the year storm signals are raised in the harbor of New York. It is true that masters are chargeable with notice of such warnings (Nicholson

v. Erie R. Co., 255 F. 54, C. C. A. 2), and are prima facie negligent if they do not see them.

But the fact of a warning is not enough, without more, to constitute negligence. The Golden Rule, 278 Fed. 1021, C. C. A. 2. See the unreported opinion below of Hough, J. We cannot agree that all work in the harbor must be suspended, for a day out of each week because the winds will blow" (pp. 362-3).

In *The Mack*, 43 F. Supp. 270, aff'd 130 F. (2d) 201, C. C. A. 2, the tug set out with her tow in disregard of storm warnings then flying at the Weather Bureau and of a low and falling barometer. The District Court exonerated the tug and the Circuit Court of Appeals affirmed, expressing surprise in a *per curiam* opinion that so many fruitless appeals are taken.

See also *Hartford & New York Transp. Co.* v. *Rogers & Hubbard Co.*, 47 F. (2d) 189, C. C. A. 2, certiorari denied, 283 U. S. 835.

In *The Katie E.*, 46 F. (2d) 534, E. D. N. Y., the tug set out in the face of storm warnings and was exonerated. The Court said:

"In the first place, the neglect of the storm warning is frankly conceded, but is not of itself sufficient to constitute negligence. Bouchard Transp. Co. v. Pennsylvania R. Co. (C. C. A. 2) 6 F. (2d) 362. Moreover, the safe accomplishment of the taking of the light tow in the morning of the same day from New York to Port Reading apprised the captain of the actual then prevailing conditions, and formed some basis for his judgment concerning the return trip" (p. 536).

In *The Imoan*, 67 F. (2d) 603, C. C. A. 2, the tug proceeded from Port Jefferson, Long Island Sound for New York. The weather was not obviously dangerous and the tug master did not telephone the Weather Bureau. The

Court found that had he telephoned he would have got advices which should have kept a careful navigator in port. The Court refused to hold that the master was negligent in failing to obtain the Weather Bureau forecast.

In *The Herkimer,* 52 F. (2d) 41, C. C. A. 2, certiorari denied 284 U. S. 665, the tug left Brewerton on Lake Oneida with a tow but before it reached Sylvan Beach, twenty-one miles away, a storm arose causing the damage sued for. The District Court held the tug at fault for leaving Brewerton without making some effort to ascertain what the weather conditions were on the lake. The Circuit Court of Appeals reversed, saying:

> "But we know of no obligation on a master to tie up for three hours to await a weather report, or indeed to make any inquiries, before embarking upon a voyage of only a few hours' duration, when all observable conditions are favorable at the time of departure" (p. 43).

In *The Victoria,* 95 Fed. 184, C. C. A. 2, certiorari denied 175 U. S. 725, the Court said:

> "The navigators of the tugs did not notice the cautionary signals displayed, nor did they advise themselves of the dispatches received at the New York weather bureau station before their departure to get their tow. The district judge holds them in fault for not 'regarding the previous public notice of a coming violent S.E. storm, with which they must stand chargeable.' We are unable to assent to this proposition. We do not find in the record any evidence that the movement of a tropical storm up the Atlantic coast will produce such a condition of affairs on the Hudson river, 40 miles from its mouth, as to make it unsafe for navigation by tugs and tows; and, in the absence of such evidence, are not inclined to hold navigators responsible for failure to keep in touch with the weather bureau reports, as they do on the seacoast, or in Long

> Island Sound. So far as appears, navigators upon the Hudson river have never regulated their movements by the reports as to gales or hurricanes upon the Atlantic coast, nor tied up their tows awaiting the fulfillment of weather bureau prophecies" (p. 186).

The effect of the instant decision is substantially to make the tug an insurer of the accuracy of its own weather forecasts. This was not formerly the law in the Second Circuit. In *The Headlight*,* 300 Fed. 84, C. C. A. 2, the Court expressly refused to go further than say that the failure of tug masters to heed weather bureau warnings is some evidence of negligence. The Court said:

> "We have held in Nicholson v. Erie Co., 255 Fed. 54, and repeated the statement in McWilliams v. Davis, 285 Fed. 312, that it is the duty of tug masters in the harbor of New York to note and give weight to the warnings of the Weather Bureau, and failure so to do is some evidence of negligence. Beyond this declaration we are not inclined to go. In this instance the only warning was against a northeast storm, and no study of that signal would have told anyone that shifting boats under the lee of the Brooklyn shore was dangerous" (p. 86).

So here, the hauling down of the hurricane signals and the substitution of northwest storm signals at 2:15 p.m. warned no one of the possibility of the arrival of the hurricane which caused respondent's loss.

In reaching the conclusion stated in *The Headlight*, supra, just quoted, the Court was not promulgating new doctrine but merely reiterated what had long been the law in the Second Circuit. See *Nicholson* v. *Erie R. Co.*, 255 Fed. 54, C. C. A. 2, and *McWilliams Bros. Inc.* v. *Davis*, 285 Fed. 312 (C. C. A. 2).

For a recent case analogous to the instant case in that

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* Referred to elsewhere as *O'Brien Bros. Inc.* v. *Davis, Director General.*

the tug set out after the storm warning had been withdrawn, see *The Bump*, 56 F. (2d) 203, E. D. N. Y., where the Court said:

> "The fact that the storm warning had been taken down at noontime has a significance that cannot be overlooked in forming an estimate of the foresight reasonably to be required on the part of the tug's captain" (p. 205).

THIRD POINT

The decision below leaves the whole industry in doubt as to its rights and obligations.

On two different points the Circuit Court of Appeals departed from the settled law as expressed in its prior decision in *O'Brien Bros. Inc.* v. *Davis, Director General*, 300 Fed. 84.

In the *O'Brien Bros.* case the District Court, 287 Fed. 543, held that the Director General of Railroads, operating the New York Central Railroad Company fleet of tugs in New York Harbor, was negligent in failing to apply to the Weather Bureau for a forecast of the weather and supplying the tug masters with the forecast so obtained. The Circuit Court of Appeals reversed, holding that there was no duty on the part of the owner and operator of tugs to apply for special forecasts and that the only duty was that on the part of the tug master to keep himself acquainted with weather warnings publicly displayed. The Circuit Court of Appeals there said:

> "We have held in Nicholson v. Erie Co., 255 Fed. 54, 166 C. C. A. 382, and repeated the statement in McWilliams v. Davis, C. C. A., 285 Fed. 312, that it is the duty of tug masters in the harbor of New York to note and give weight to the warnings of the Weather

Bureau, and failure so to do is some evidence of negligence. *Beyond this declaration we are not inclined to go.* In this instance the only warning was against a northeast storm, and no study of that signal would have told any one that shifting boats under the lee of the Brooklyn shore was dangerous.

There can be no reason for imposing one rule upon the navigator and owner of one tug, who when out in the harbor can see only the warning, and another upon the operator of numerous tugs. *The ultimate test of liability in a case between tug and tow is practically always the management of the directing tug as a towing entity,* and the only just rule is to treat all tugs alike so far as general regulations are concerned. There is no evidence for taking this case out of the general regulation we have already quoted (italics ours).

The master of any vessel is bound to ordinary care and the skill of his calling, and no more. The length and breadth of that measure is to some extent a matter of definition by courts. By the decisions above cited it is held to be a part of such care or skill to observe Weather Bureau *warnings* as publicly displayed. We do not deem it part of the duty of such navigator to ascertain whether the local Weather Bureau has any private information or unpublished opinions about weather to come" (p. 86).

This declaration has been regarded as the law, at least in this Circuit, since 1924 when the opinion was handed down. There is no evidence in the instant case of any change in conditions or of any practice or custom to justify a change in the rule. Nevertheless the Circuit Court of Appeals below expressly overruled its earlier decision in the *O'Brien Bros.* case saying:

"In determining that we hold that the carrier is charged with notice of all information, available to those in its employ on shore, and that its liability is not limited by what the tug's master knew. That, it is true, is contrary to O'Brien Bros. Inc. v. Davis, Director General, 300 Fed. Rep. 84, 86, where we held that

> the 'ultimate test of liability in a case between tug and tow is practically always the management of the directing tug as a towing entity.' * * * The fiction that in such a situation the liabilities are to be judged by treating the tug as a jural person, has neither reason nor authority to commend it. Pro tanto, we therefore overrule O'Brien Bros. v. Davis, Director General, supra (300 Fed. Rep. 84)" (R. 226-7).

In the *O'Brien Bros.* case the Circuit Court of Appeals expressly held that a New York Harbor tug is not obliged to carry or consult a barometer. Indeed, the Court went further and took the position that in the absence of some showing of usage or custom it was not within the province of the Court to lay down a rule that a harbor tug must carry a barometer. The Court said:

> "We cannot agree that the evidence in this case presented any question as to the duty of the individual tugboat master to carry a barometer. The equipment of vessels, whether used in harbors or on the high seas, is regulated either by tradition or statute. No statute requires a harbor tug to carry a barometer, and there is no evidence showing usage, custom, or tradition in support of the practice suggested. We do not think it lies within the province of a Court to lay down such a rule as the one suggested, in the absence of evidence on the subject" (pp. 85-6).

In the instant case there is no evidence showing any usage, custom or tradition as to the carrying of barometers by harbor tugs.

Subsequent to the *O'Brien Bros.* decision the rule that harbor tugs are not required to carry barometers was twice reiterated. *The Russell No. 5*, 26 F. Supp. 575, 578, aff'd without opinion, 104 F. (2d) 1018, C. C. A. 2; *New York Trap Rock Corporation* v. *Merritt-Chapman & Scott Corporation*, not officially reported, 1941 A. M. C. 801.

Although in 1924 the Circuit Court of Appeals thought it outside its province to lay down as a rule that harbor tugs must carry barometers, in the instant case the Court had no such reluctance. The Court said:

> "The carrier had no barometer at the Greenville Station, or, so far as appears, anywhere else; a fault on the part of one engaged in such extensive maritime operations" (R. 228).*

In the *O'Brien Bros.* case the Court said:

> "There can be no reason for imposing one rule upon the navigator and owner of one tug, who when out in the harbor can see only the warning, and another upon the operator of numerous tugs" (p. 86).

With the authoritative language of the *O'Brien Bros.* decision before them, operators of tugs in New York Harbor were entitled to regard it as settled law that they were neither obliged to maintain barometers nor to obtain from the Weather Bureau and pass on to tug masters forecasts of the weather. It is not unfair to say that operations generally in New York Harbor were conducted on that basis. However, in the midst of litigation, after the event, the Court below has changed the rule in two respects without evidence establishing any change of conditions to justify a new rule.

In *United States* v. *Flannery*, 268 U. S. 98, this Court said that

> "Decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons" (p. 105).

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* It is noteworthy that the extent of the operations of petitioner's connecting carrier was not established. Whether it operated two or twenty tugs does not appear.

To the same effect see *Westinghouse Co.* v. *Formica Co.*, 266 U. S. 342, 349; *United States* v. *Title Ins. Co.*, 265 U. S. 472, 486; *National Bank* v. *Whitney*, 103 U. S. 99, 102.

Indeed, in *The Fulton*, 54 F. (2d) 467, C. C. A. 2, the Court, although disagreeing with its earlier decisions, considered itself bound thereby saying:

> "However, unless the Supreme Court chooses finally to settle the whole matter otherwise, in crossing situations *we have no option* and shall continue to disregard the rule, whatever our personal judgment" (p. 468; italics ours).

In *The Eastern Glade*, 101 F. (2d) 4, C. C. A. 2, the Court, reluctant to follow its previous decisions, nevertheless considered itself bound thereby.

LAST POINT

It is respectfully submitted that the writ of certiorari prayed for should be granted, that the decision of the Circuit Court of Appeals be reversed, and that the judgment of the District Court be reinstated, with costs.

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New York, N. Y.
February 23, 1944.

(P-368)